Filed 7/27/09 P. v. O'Neill CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY SEAN O'NEILL, Defendant and Appellant.	C058779 (Super. Ct. No. P06CRF0503)

Defendant Timothy Sean O'Neill was convicted of first degree residential burglary. On the third day of defendant's jury trial, immediately following an unsuccessful motion to replace counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), defendant entered into a negotiated plea agreement whereby he pled no contest to first degree residential burglary (Pen. Code, § 459)[1] and admitted to having a prior conviction for carjacking (§ 215), a strike within the meaning of the "Three

[1] All further statutory references are to the Penal Code unless otherwise specified.

Strikes" law and a serious felony within the meaning of section 667, subdivision (a). In accordance with the plea agreement, the trial court dismissed a prior prison term enhancement allegation (§ 667.5, subd. (b)), and sentenced defendant to a stipulated sentence of nine years in state prison. One month after judgment was rendered, defendant unsuccessfully moved the court to withdraw his no contest plea.

On appeal, armed with a certificate of probable cause, defendant contends: (1) the trial court erred in denying his *Marsden* motion and that such denial resulted in an involuntary plea; (2) the trial court prejudicially abused its discretion in denying his postjudgment motion to withdraw his no contest plea; and (3) he was denied effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. We disagree with each contention and affirm the judgment.

PROCEDURAL BACKGROUND

Defendant's First Complaint About Counsel

Defendant first complained about his attorney, Gilbert Maines, on October 2, 2007. After Mr. Maines requested a continuance, informing the court that he had been in the hospital the night before, defendant stated: "I don't think he [Mr. Maines] has been ready." Defendant continued: "He hasn't been able to help me at all so you may be wanting to get me another lawyer because he hasn't been able to help me." Defendant then complained that his attorney had been unable to find any witnesses and that he was not shown a copy of the

police report until 10 and a half months into the case. The court responded that it was prepared to grant a continuance so that defendant's attorney could "be geared up, whoever lawyer that is." With defendant's agreement, trial was continued until November 27, 2007.

Defendant's Second Complaint About Counsel

On December 10, 2007, following additional continuances due to the death of Mr. Maines's mother, defendant made a *Marsden* motion to replace counsel. Defendant explained to the court that he was "not comfortable going to trial not knowing anything about [the case]."

Mr. Maines then placed defendant's vague assertion in context: "Your Honor, [defendant] has been asking for investigators to go out and locate witnesses in this case. [¶] We've had -- the Court has appointed Steve Clifford, who has spent hours and hours and hours in Swansboro looking for any witnesses that may have been present. [¶] There have -- we have not been able to get from [defendant] or anybody else the names of anybody that was there. So we're sort of looking for people in the dark. [¶] Now, [defendant] is concerned that I haven't found him any witnesses and therefore, according to him, I have not investigated this case." Mr. Maines continued: "I don't know what else that I can do. We have had [defendant] gave me the name of a potential witness. The District Attorney got a photo I.D. lineup and took it to [defendant]. He couldn't pick that witness out of the photo I.D. lineup. [¶] . . . [¶] We have done as much investigation as we can possibly do. I

think Mr. Clifford has gone through the initial order of $500 and has gotten a subsequent order and may have even gotten a third order in this case and he's out trying to find . . . the people that were available out there."

When asked if he was prepared to go to trial, Mr. Maines responded: "I am as prepared as I can be, Your Honor." The trial court agreed and denied the motion.

Defendant's Third Complaint About Counsel

On February 19, 2008, following additional continuances requested by defendant to allow him to locate additional witnesses, defendant again complained about Mr. Maines's inability to procure witnesses on his behalf. Mr. Maines again explained that defendant did not know the names of the witnesses he sought to locate, that the investigator had spent many hours attempting to locate witnesses, and that two witnesses had in fact been located.

Defendant also asserted that he did not "feel comfortable" going to trial with Mr. Maines as his attorney because Mr. Maines only visited him twice in jail and did not file a motion asserting that defendant had not been brought in for arraignment within 48 hours, the goal of such motion, according to defendant, would have been to convince the District Attorney to "sweeten the deal somewhat." Mr. Maines then explained to the court that such a motion would have been "meaningless" since defendant was also in custody on five other matters which were trailing the burglary trial; even if defendant was not timely arraigned on the burglary, he could still be held for any one of

the other charges. The trial court agreed and explained to defendant that he must defer to his attorney's assessment of whether a motion would be worthwhile to file.

The court concluded: "I don't see any legal basis for relieving Mr. Maines and delaying this trial. [¶] So if this is in the merit of a *Marsden* motion, I cannot grant it." (*Sic*.)

Defendant's Final Complaint About Counsel

On February 21, 2008, the third day of defendant's jury trial, defendant again moved the court to replace Mr. Maines. It appears that two of defendant's witnesses, Jennifer Elliot and Keith Whitaker, did not show up to testify the day before. When they were arrested for contempt of court, Jennifer explained that the defense's key witness, Lisa Whitaker (defendant's girlfriend and Keith's mother), had tried to encourage them both to give false statements to the defense investigator, and that they did not want to lie under oath. Lisa Whitaker had already testified for the defense, and defendant was informed that the prosecution would be allowed to call Jennifer to the stand to explain to the jury that Lisa had requested that she perjure herself. Faced with the complete meltdown of his defense, and citing "lies" told to him by Mr. Maines and "numerous things that's gone wrong [*sic*]" before and during the trial, defendant asked the court if he could "start this whole thing over."

The trial court once again gave defendant an opportunity to air his grievances. Defendant began by claiming that Mr. Maines had still only been to see him twice to discuss the case, and

that he had lied about the length of one of the visits. The court responded: "It is up to your attorney to decide how much time he needs to spend with you. [¶] . . . [¶] And he got your witness. He got some witnesses here for you. So you can't say that he is not doing anything." With respect to these witnesses, defendant again asserted that there were additional witnesses that Mr. Maines was unable to locate. The court responded: "They made diligent efforts to try to find these other witnesses. But you don't have names. Without names it is hard to find witnesses, isn't it?" Defendant protested that he did not know any names.

Defendant then reiterated his complaints concerning Mr. Maines's alleged infrequent visits and refusal to confer with him concerning the preparation of the defense, failure to file defendant's requested motion, and failure to investigate thoroughly, adding that Mr. Maines had lied to him about whether the investigator took Lisa Whitaker with him when he searched for witnesses. Finally, defendant complained that Mr. Maines "refused to declare a conflict between us and it has been constant him yelling at me and not conferring with me." The court responded: "That's up to him as to whether there is an irreparable breakdown in your relationship such that you declare a conflict. He has obviously investigated this case, come up with your witnesses. It looks to me like he's been trying to help you."

After defendant had expressed his concerns about the representation, Mr. Maines added: "For the record, I will say

this, that at this point in this case it has become apparent to me that there is a serious breakdown between [defendant] and I. [*Sic.*] He's made five different *Marsden* motions. I have -- I am not going to perjure myself to this Court and say that I am not ready for trial or that I thought at those times that there was a conflict. He was concerned. [¶] Right -- but as of now, he won't even take my advice, and I can't -- I can't get him to take my advice. He won't listen to anything I have to say. And I think that is -- that is very serious, and I don't know if we need to appoint somebody else to come in and give him some . . . legal [advice] or what, but he certainly won't take mine. And there is that kind of breakdown between [defendant] and I [*sic*] for sure."

The court responded: "Sure. But I am not sure it would be any different with any other attorney. You are a difficult client, [defendant]." Defendant then stated that he had reported Mr. Maines to the State Bar of California.

The court denied the motion and informed defendant: "We are going to proceed. You can either plead on the proposal that has been made, or risk going [back] to trial and being convicted of everything and serving up to 19 years." The court then gave defendant some time to confer with Mr. Maines concerning his next move.

Defendant's Plea and Sentence

After discussing the matter with Mr. Maines, defendant returned to the courtroom and entered a negotiated plea of no contest to first degree residential burglary and admitted to

having a prior conviction for carjacking, a strike within the meaning of the Three Strikes law and a serious felony within the meaning of section 667, subdivision (a). In accordance with the plea agreement, the trial court dismissed a prior prison term enhancement allegation (§ 667.5, subd. (b)), and sentenced defendant to a stipulated sentence of nine years in state prison.

Defendant's Postjudgment Motion to Withdraw the Plea

Nearly one month after judgment was rendered, defendant brought a motion to withdraw his no contest plea. Defendant argued in his moving papers that "he was compelled to enter a plea while under extreme duress and intimidation" caused by the fact that he was "denied the opportunity to adequately defend himself against [the] unforeseen circumstances which arose during his trial," i.e., the fact that two of his witnesses had lied to his investigator and decided not to show up to testify on his behalf because they did not wish to perjure themselves. On April 25, 2008, after entertaining argument, the trial court denied defendant's motion to withdraw his plea.

DISCUSSION

I

Defendant contends the trial court erred in denying his *Marsden* motion and that such denial resulted in an involuntary plea.[2] We disagree.

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[2] As a preliminary matter, a defendant who enters a guilty or no contest plea may not assert on appeal the erroneous denial of

As recently reiterated by the California Supreme Court in *People v. Mungia* (2008) 44 Cal.4th 1101 (*Mungia*): "'In [*People v. Marsden*, *supra*, 2 Cal.3d 118], we held that a defendant is deprived of his constitutional right to the effective assistance of counsel when a trial court denies his motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. A defendant must make a sufficient showing that denial of substitution would substantially impair his constitutional right to the assistance of counsel [citation], whether because of his attorney's incompetence or lack of diligence [citations], or because of an irreconcilable conflict [citations]. We require such proof because a defendant's right to appointed counsel does not include the right to demand appointment of more than one counsel, and because the matter is generally within the discretion of the trial court. [Citation.]' [Citation.] When reviewing whether the trial court abused its discretion in denying a *Marsden* motion, we consider whether it made an

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a *Marsden* motion unless he also asserts that the plea "was not intelligently and voluntarily made" or "that the advice he received from counsel was inappropriate concerning his plea." (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 786 (*Lobaugh*); *People v. Lovings* (2004) 118 Cal.App.4th 1305, 1310-1311 (*Lovings*).) Absent such an assertion, the claimed *Marsden* error "does not go to the legality of the proceedings resulting in the plea" and defendant is therefore "foreclosed from raising that issue on appeal." (*Lobaugh*, *supra*, 188 Cal.App.3d at p. 786; *Lovings*, *supra*, 118 Cal.App.4th at p. 1311.) Here, as will be explained more fully in section II, below, defendant's plea was freely and voluntarily entered into. However, because defendant does assert that the claimed *Marsden* error resulted in an involuntary plea, we consider this claim of error.

adequate inquiry into the defendant's complaints. [Citation.]" (*Mungia*, *supra*, 44 Cal.4th at pp. 1127-1128; *People v. Smith* (2003) 30 Cal.4th 581, 606; *People v. Ortiz* (1990) 51 Cal.3d 975, 980, fn. 1.)

In this case, the trial court conducted multiple in camera hearings to give defendant a forum for his complaints. Accordingly, defendant's argument rests on the theory that based on the facts adduced during these hearings, the trial court abused its discretion in not granting the motion. To succeed, defendant must show that the evidence at the hearing demonstrated an irreconcilable conflict with counsel such that incompetent representation would likely result. (See *People v. Earp* (1999) 20 Cal.4th 826, 876.)

Defendant has made no such showing. With respect to defendant's complaint that Mr. Maines had only come to see him on two occasions, the trial court was entitled to credit Mr. Maines's testimony that he had visited defendant to discuss the case "way more than twice." Moreover, the pertinent question was not the numerical frequency of the visits, but rather whether Mr. Maines was diligently preparing for trial and appropriately conferring with defendant concerning the preparation of the defense.

With respect to defendant's complaints concerning Mr. Maines's preparation for trial and inability to locate witnesses to testify on his behalf, Mr. Maines explained that the court had appointed an investigator who spent hours attempting to locate witnesses, and despite the fact that defendant did not

provide him with the names of any of the witnesses he wanted located, the investigator was able to locate two witnesses who agreed to testify on defendant's behalf. The record supports the trial court's assessment that Mr. Maines had diligently investigated the case. It was not Mr. Maines's fault that defendant did not know the names of the additional witnesses he wanted located. Nor was it his fault that the two witnesses who were located decided not to show up to testify because of a reluctance to commit perjury.

Defendant's complaints about not being consulted concerning the preparation of the defense, in reality, amount to a disagreement between defendant and Mr. Maines concerning their next move following the collapse of the defense. However, a trial court need not replace counsel "merely because of a disagreement [between defendant and] counsel over reasonable tactical decisions." (*People v. Lara* (2001) 86 Cal.App.4th 139, 151; see *People v. Williams* (1970) 2 Cal.3d 894, 905.) Unfortunately for defendant, the two witnesses he hoped to call to testify on his behalf decided not to perjure themselves, as requested to do so by defendant's girlfriend, and other witnesses he hoped the investigation would unearth proved elusive, largely because defendant did not know who they were. Obviously defendant was upset about these developments. But the fact he blamed his lawyer for them does not show that the lawyer was inept, or incapable of representing defendant, despite the tension between them. The trial court, assessing counsel's

testimony, concluded he had acted reasonably. The record supports that finding.

With respect to defendant's complaints about not getting along with Mr. Maines and generally feeling uncomfortable with him as his attorney, the fact defendant lacked confidence in or did not get along with counsel did not entitle him to new counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1092 ["Although defendant's frustration with counsel was clearly evident, the record reflects substantial investigative efforts by [counsel] and his anticipated readiness to proceed"].) Moreover, defendant's statement that he had reported Mr. Maines to the State Bar of California, even if true, did not entitle him to new counsel, otherwise any defendant could manipulate the system; the complaint merely raised the possibility of a conflict, not an actual conflict. (*People v. Horton* (1995) 11 Cal.4th 1068, 1106; *People v. Hardy* (1992) 2 Cal.4th 86, 135-138.)

Finally, the fact Mr. Maines ultimately declared that defendant was not listening to his advice did not compel the trial court to grant the motion. Although relevant, it was not dispositive. Otherwise, trial counsel could always delay a trial or get rid of a difficult client by agreeing they could not work together. Mr. Maines offered no specific facts showing that he could not communicate with defendant as necessary to prepare for and conduct the trial, and even stated, "I am not going to perjure myself to this Court and say that I am not

ready for trial . . . ." Mr. Maines did not assert that the matter was hopeless.

Moreover, the trial court found that defendant was the cause of the problems between him and his attorney. "We rely in the first instance on our trial courts to determine whether a criminal defendant is represented by an attorney truly laboring under conflicting interests or whether the defendant has simply engineered an apparent conflict in an attempt to delay the ultimate moment of truth, the jury's verdict." (*People v. Roldan* (2005) 35 Cal.4th 646, 675, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) The record adequately supports the trial court's assessment that defendant was a "difficult client" and no other alternative was likely to succeed.

Defendant has not demonstrated that the trial court abused its discretion on this record.

II

Defendant further contends the trial court prejudicially abused its discretion in denying his postjudgment motion to withdraw his no contest plea. Not so.

Section 1018 authorizes a trial court, for "good cause shown," to allow a "plea of guilty to be withdrawn and a plea of not guilty substituted." As our Supreme Court explained in *People v. Cruz* (1974) 12 Cal.3d 562: "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence.

[Citations.]" (*People v. Cruz*, *supra*, 12 Cal.3d at p. 566; see also *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

Moreover, a plea "resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103; *People v. Urfer* (1979) 94 Cal.App.3d 887, 893.) Accordingly, the trial court's decision to deny defendant's motion to withdraw his no contest plea will not be disturbed on appeal unless defendant can show a clear abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Rivera* (1987) 196 Cal.App.3d 924, 926-927.)

"Although section 1018 is limited on its face to the period before judgment, the courts have long permitted defendants to move to set aside the judgment as a means of allowing the defendant to withdraw the guilty plea after judgment. [Citations.]" (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616-1617 (*Castaneda*).) However, a postjudgment motion to withdraw a guilty or no contest plea "is recognized as equivalent to a petition for the common law remedy of a writ of error *coram nobis*," which may only be granted "when three requirements are met: (1) the petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of judgment; (2) the petitioner has shown that the newly discovered evidence does not go to the merits of the issues tried; and (3) the petitioner has shown that the facts upon which he relies were not known to him

and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. [Citations.]" (*Castaneda*, *supra*, 37 Cal.App.4th at pp. 1618-1619; see also *People v. Shipman* (1965) 62 Cal.2d 226, 230; *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474; *People v. Stanworth* (1974) 11 Cal.3d 588, 594, fn. 5.)

Defendant contends that because his plea was induced by "duress and fear," we should "treat [his] motion to withdraw his plea as a petition for writ of coram nobis, grant the writ, set aside the judgment, and permit [him] to enter his plea of not guilty." However, defendant has not demonstrated the existence any of the coram nobis requirements. Nor was defendant's no contest plea induced by "duress and fear" which overcame his exercise of free judgment. "'Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering his decision.'" (*People v. Hunt*, *supra*, 174 Cal.App.3d

at p. 103, quoting *Brady v. United States* (1970) 397 U.S. 742, 756-757 [25 L.Ed.2d 747, 761].)

In this case, defendant was faced with the choice of pleading no contest and being sentenced to nine years in prison, or continuing to verdict without two of his witnesses, secure in the knowledge that the jury would be told that his only other witness, his girlfriend, had encouraged these two witnesses to lie for him. Defendant correctly assessed the strength of the prosecution's case against him, as well as the weakness of his own defense, and took the only sensible course of action.

Defendant's reliance on *People v. Dena* (1972) 25 Cal.App.3d 1001 (*Dena*), and *People v. Ramirez* (2006) 141 Cal.App.4th 1501 (*Ramirez*), is misplaced. In both of these cases, the People suppressed exculpatory evidence which "deprived defendant of the right to assert a defense" and "overcame his exercise of free judgment." (*Dena*, *supra*, 25 Cal.App.3d at pp. 1009, 1013; *Ramirez*, *supra*, 141 Cal.App.4th at pp. 1506, 1507-1508.) Here, defendant's purported duress resulted not from any action taken by the People, but from the collapse of his own defense. This is not the sort of "coercion" or "duress" which authorizes the withdrawal of a guilty or no contest plea. If a defendant's overestimation of the strength of the People's case against him "is hardly the type of mistake, ignorance or inadvertence which would permit the withdrawal of a guilty plea" (*People v. Watts* (1977) 67 Cal.App.3d 173, 183), then certainly an accurate assessment of the strength of the People's case, and of the

corresponding weakness of his own defense, cannot constitute grounds for the withdrawal of a plea.

Accordingly, because defendant has failed to demonstrate that he was operating under circumstances that overcame the free exercise of his judgment in deciding to enter his plea of no contest, the trial court did not abuse its discretion in denying his motion to withdraw the plea.

III

Finally, defendant contends he was denied effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. Specifically, defendant claims that Mr. Maines should not have informed the trial court that the main defense witness possibly solicited false testimony from the other defense witnesses, and should have requested a continuance in order to investigate whether such solicitation had actually occurred. We disagree with this contention as well.

The burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) To prevail on such a claim, defendant "'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner

challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." [Citation]. Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.]' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 162-163; see also *People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Moreover, when a defendant has entered into a plea, he must demonstrate a reasonable probability that, but for counsel's errors, he would not have entered into the plea and would have insisted on going to trial. (*In re Alvernaz* (1992) 2 Cal.4th 924, 934; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1134.)

In this case, defendant has demonstrated neither deficient performance, nor prejudice. However, even if defendant could demonstrate that Mr. Maines performed deficiently by informing the trial court of the situation regarding the potential encouragement of perjured testimony on defendant's behalf, and by failing to ask for a continuance to investigate the situation further, defendant has failed to demonstrate a reasonable probability that he would not have entered the plea but for counsel's alleged deficient performance.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.